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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1098

LOUIS PARKER,

Petitioner,

versus

CARGILL, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Fifth Circuit

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IN THE
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No.

LOUIS PARKER,

Petitioner,

versus

CARGILL, INC.,

Respondent.

Petition For A Writ Of Certiorari To The
United States Circuit Court Of Appeals
For The Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on October 2, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported but it is printed in Appendix A.

Petition for rehearing was timely filed and denied on October 31, 1969 and is printed in Appendix B.

Findings of Fact and Conclusions of Law of the District Court are printed in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 2, 1969. Rehearing was denied on October 31, 1969. Jurisdiction of this Court is invoked under the provisions of 28 U. S. C. §1254(1).

QUESTION PRESENTED

Whether a vessel owner must have control over a vessel at the time an unseaworthy condition occurs before it can be held liable for damages resulting from injuries caused by the unseaworthy condition.

STATEMENT

Petitioner, Louis Parker, sustained disabling injuries while descending a ladder when he slipped on a portable light which was hooked on a rung of the ladder. The ladder led into one of the cargo spaces of a barge known as Barge J-9 and owned by the defendant, Cargill, Inc.

At the time of his injury the Barge J-9 was in a floating dry-dock undergoing minor repairs and being cleaned so it could be returned to the same service it was performing before it was dry-docked.

Petitioner, Louis Parker, was employed by Dravo Corporation which corporation was employed by the barge owner to perform work on the barge. The petitioner was assisting in the cleaning operation.

Petitioner filed suit in the Federal District Court for the Eastern District of Louisiana, New Orleans Division, alleging that the presence of the portable light on the rung of the ladder caused him to fall and sustain injuries; that the presence of the light on the rung of the ladder rendered the barge in question unseaworthy and that the owner of the barge, Cargill, Inc., is liable for all damages resulting from his injuries.

The District Court denied recovery holding, *inter alia*, that:

> " . . . the cause of the plaintiff's fall was the presence of the portable light on the rung of the ladder, which was a transitory condition resulting from the course of performing the contract by Dravo which alone had custody and control of the vessel and therefore the warranty of seaworthiness did not extend to the plaintiff". R.12

In short, the District Court below held that the vessel owner was not liable for the unseaworthy condition which caused the plaintiff's injury because it did not have control over the barge in question at the time the unseaworthy condition occurred. The Court of Appeals for the Fifth Circuit affirmed the District Court's ruling in a *per curiam* opinion.

REASONS FOR GRANTING THE WRIT

I.

CONFLICT WITH DECISIONS OF SUPREME COURT

Beginning with *Seas Shipping Co. v. Sieracki,* 328 U. S. 85 (1945), this Court has consistently held that those in the service of the ship doing seaman's work are entitled to the warranty of seaworthiness. See also *Pope & Talbot, Inc. v. Hawn,* 346 U. S. 406 (1953).

The obligation to provide a seaworthy vessel "is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one he cannot contract away as to any workman within the scope of its policy". id. at p. 100.

The duty to provide a seaworthy vessel is an absolute duty and does not depend upon negligence. *Seas Shipping Co. v. Sieracki,* 382 U. S. 85 (1945). Control is an element of fault and fault is an ingredient of negligence. Neither control nor fault is necessary for a cause of action based on unseaworthiness because such a cause of action is "a species of liability without fault." *Seas Shipping Co. v. Sieracki,* 382 U. S. 85, 94 (1945). See also *Crumady v. Joachim Hendrik Fisser,* 358 U. S. 423, 427 (1959). *Rogers v. United States Lines,* 347 U. S. 984 (1954).

In *Alaska Steamship Co., Inc. v. Petterson,* 347 U. S. 396 (1954), the plaintiff was employed as a longshore foreman by a stevedoring company. The stevedoring company was engaged by Alaska Steamship company, Inc. to load its vessel. The stevedoring

company, the plaintiff's employer, was authorized to use its own gear in the loading operation. Accordingly, the plaintiff and his fellow employees rigged up a snatch block which was owned by the stevedoring company and brought aboard the vessel by that company's employees.

While being put to a proper use in a proper manner, the block broke and injured the plaintiff. The plaintiff sued the vessel owner under the General Maritime law alleging that the defective snatch block rendered the vessel unseaworthy.

Notwithstanding the fact that the block was owned by the plaintiff's employer and was under the control of someone other than the vessel owner, the Court held the vessel unseaworthy and allowed recovery against the vessel owner.

In the present case, however, the lower court ruled that a vessel owner must have control over a vessel when the unseaworthy condition occurs before the vessel owner can be held liable for injuries resulting from the unseaworthy condition. Such a holding is in conflict with this Court's ruling in *Alaska Steamship Co., Inc. v. Petterson*, 347 U. S. 396 (1954). See also *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423 (1959). *Rogers v. United States Lines*, 347 U. S. 984 (1954).

The court below based its decision on *West v. United States*, 361 U. S. 118 (1959). This decision we submit is not applicable to the present case.

In *West v. United States,* the vessel had been in the "moth ball fleet" for several years and at the time of the injury the vessel was not in navigation. Since it was out of navigation, the warranty of seaworthiness was not applicable. The only basis of recovery available to the plaintiff in the *West* case was negligence; and control is an essential ingredient of a cause of action based on negligence. Therefore, when the Court in *West* discussed the importance of the vessel owner having control over the vessel, it could only have intended to formulate a rule for vessels out of navigation. The rule of law set forth in *West* should not be applied to vessels which are in navigation at the time the cause of action arises. The warranty of seaworthiness is applicable to those vessels and the doctrine of seaworthiness is a "species of liability without fault" and the lack of control is of no significance.

Louis Parker, the plaintiff and appellant in the present case, was aboard the Barge J-9 for the purpose of assisting in the operation of cleaning the tanks of the barge. The Barge J-9 had never been removed from navigation and was in navigation at the time of the plaintiff's injury. The type work in which the plaintiff was engaged at the time of his injury was work traditionally done by seamen. See Norris, *Maritime Personal Injuries,* 2d Ed. Sec. 51, P. 116 (1966).

The owner of the Barge J-9, Cargill, Inc., owed the warranty of seaworthiness to the plaintiff. The fact that the owner of the Barge J-9 did not have control of the vessel at the time the unseaworthy condition occurred is of no significance.

II.

CONFLICTS WITH OTHER CIRCUITS

The decision of the Fifth Circuit in the present case is in conflict with the decisions of other Circuit Courts.

SECOND CIRCUIT:

In *Albanese v. N. V. Nederl. Amerik Stooniv. Moats,* 392 F. 2d 763 (2d Cir. 1968), reversed on other grounds see 393 U.S. 74. The Second Circuit Court of Appeals stated that "regardless of the shipowner's control or lack of it, he still has a nondelegable duty to use reasonable care to keep the area a safe one in which to work." Failure to do this, the Court ruled, could be the basis for a cause of action for unseaworthiness. id. at p. 764.

NINTH CIRCUIT:

In *Petterson v. Alaska Steamship Co.,* 205 F. 2d 478 (9th Cir. 1953), the Ninth Circuit Court of Appeals held that in a cause of action based on unseaworthiness "It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, or that the result would not have occurred unless someone were negligent." The Court stated "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists." id. at p. 479.

III.

IMPORTANCE OF THE QUESTION

The duty of a vessel owner to provide a seaworthy vessel has long been a part of maritime law. It is an absolute duty and is not dependent on negligence.

The Court below by its holding in the present case is either attempting to convert the obligation to provide a seaworthy vessel from an absolute duty to one dependent on fault or seeking to carve out an exception to the vessel owner's responsibilities. Neither of these objectives is in keeping with the prior decisions of this Court or of the decisions in other Circuits.

Petitioner is convinced that the Court upon examination of the decision of the Fifth Circuit will be readily persuaded that its discretionary jurisdiction should be exercised and the case should be reviewed.

CONCLUSION

To protect the integrity of this Court's decisions in the cases referred to above, to resolve a conflict between the circuits and to preserve the warranty of seaworthiness in its present posture, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27533
Summary Calendar

LOUIS PARKER,
Plaintiff-Appellant,

versus

CARGILL, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 2, 1969)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: Appellant Parker, a shipyard worker employed by Dravo Corporation at its repair facility in Baton Rouge, Louisiana, filed an action in the United States District Court for the Eastern District of Louisiana seeking to recover damages for per-

sonal injuries received aboard the coal and molasses barge J-9, owned by appellee Cargill, Inc. He contends that his injuries were caused by an unseaworthy condition for which the vessel owner is liable. The district court found for Cargill, and this appeal was taken. We affirm.[1]

Cargill turned over the barge J-9, empty and unmanned, to Dravo for repairs and cleaning. On February 14, 1964, the barge was placed in a floating dry-dock on navigable waters in the Mississippi River. While thus situated on February 17, 1964, Parker went on board to assist in the cleaning operation. He was injured when he slipped and fell from a ladder while descending into one of the cargo holds of the barge. At the time of injury, Dravo had exclusive custody and control of the barge and the repair and cleaning operations were being conducted under its direction.

The district court found that Parker's injury was caused by either or both of the following conditions: the presence of molasses on the deck and ladder of the barge; the presence of a portable lantern left hanging on a rung of the ladder by another employee of Dravo. The court reasoned that neither of these causal agents could give rise to unseaworthiness liability. The molasses residue on the barge was a condition which Parker as a Dravo employee was called on board to

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[1] Pursuant to new Rule 18 of the Rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 409 F.2d 804, Part I (5th Cir. 1969).

correct.[2] Relying principally on *Moye v. Sioux City & New Orleans Barge Lines, Inc.*,[3] the negligently placed lantern was found to be a transitory condition which occurred during the course of performing the repair contract by Dravo and as a result of such performance. It is only this latter conclusion that parker contests here.

The parties agree that it is not possible to distinguish the present case from *Moye*. Parker, however, urges that *Moye* was erroneously decided and should not be followed. He contends that in reaching its decision, the *Moye* court misconstrued *West v. United States*.[4]

In *West* the Supreme Court faced the claim of a shipyard worker against a shipowner, grounded in negligence as well as the warranty of seaworthiness. In denying recovery, the Court was influenced by the fact that an independent contractor rather than the owner had custody and control of the vessel at the time of injury. It is Parker's contention, contrary to *Moye*, that *West* treats the element of control as modifying only the potential liability of a shipowner for negli-

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[2] *See*, Pinion v. Mississippi Shipping Company, 156 F. Supp. 652 (E.D. La. 1957); Brusbewski v. Isthmian S.S. Co., 163 F.2d 720 (3d Cir. 1947); Byars v. Moore-McCormack Lines, 155 F.2d 587 (2d Cir. 1946); McDaniel v. The M/S Lisholt, 282 F.2d 816 (2d Cir. 1960).

[3] 402 F.2d 238 ((5th Cir. 1968).

[4] 361 U.S. 118 (1959). In *West* the injured workman was a member of the crew of an independent contractor employed by the government to completely overhaul an inactive merchant ship. The vessel, after several years in "moth balls", had been towed to the contractor's repair dock for the express purpose of rendering her seaworthy.

gence, and that the absence of control over the circumstances of an injury has no effect on the warranty of seaworthiness. We cannot agree with this contention, and conclude that *Moye* properly interpreted *West* as a sensible but very restrictive limitation on unseaworthiness liability.[5]

As noted in the opinion of Chief Judge Brown concurring in *Moye*,[6] there may be instances in which a shipowner will be liable for injuries to a repairman caused by an unseaworthy condition even though he does not have physical possession of the vessel. However, this will not be the case where the injury is caused by a transitory condition resulting from the course of performing a repair contract by one who alone has present custody and control of the vessel.

The judgment is AFFIRMED.

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[5]Parker's criticism focuses on a passage quoted by the *Moye* opinion from *West v. United States:*

> "Petitioner overlooks that here the respondent had no control over the vessel, or power either to supervise or to control the repair work in which petitioner was engaged. We believe this to be decisive against both aspects of plaintiff's dual theory [of warranty of seaworthiness and negligence]."

402 F.2d at 240.

Parker contends that the insertion [of the phrase] "of warranty of seaworthiness and negligence", which did not appear in *West*, does not accurately identify the antecedent of the phrase "plaintiff's dual theory." He discounts identical treatment by the Second Circuit in Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599 (2d Cir. 1960), as identical error.

Assuming arguendo that the quotation has been used inappropriately, neither the vitality of *Moye*, nor the aptness of its interpretation of *West* is thereby impaired.

[6]402 F.2d at 241.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27,533

LOUIS PARKER,
Plaintiff-Appellant,

versus

CARGILL, INC., ET AL,
Defendants-Appellees.

PETITION FOR REHEARING

Petitioner respectfully requests that this Court grant a rehearing.

The single issue for review in the present case is whether a vessel owner must have custody or control of a vessel in navigation at the time an unseaworthy condition occurs before the vessel owner can be held liable for damages resulting from the unseaworthy condition.

In its opinion dated October 2, 1969, this Court answered affirmatively and cited *West v. United States,* 361 U. S. 118 (1959) as the basis for its decision. We submit that the *West* case should not be depositive of the present case.

In *West v. United States,* the vessel had been in the "moth ball fleet" for several years and at the time of the injury the vessel was not in navigation. Since it was out of navigation, the warranty of seaworthiness was not applicable. The only basis of recovery available to the plaintiff in the *West* case was negligence and control is an essential ingredient of a cause of action based on negligence. Therefore, when the Court in *West* discussed the importance of the vessel owner having control over the vessel, it could only have intended to formulate a rule for vessels out of navigation. The rule of law set forth in *West* should not be applied to vessels which are in navigation at the time the cause of action arises because the warranty of seaworthiness is applicable to these vessels and control is not an essential ingredient of a cause of action based on a theory of unseaworthiness. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946).

In the present case the barge, J-9, was only being cleaned and undergoing minor repairs in a floating drydock and was in navigation at the time appellant was injured. *Hunt v. United States,* 17 F. Supp. 578 (S.D.N.Y. 1936); 9 F. 2d 1014 (2d Cir. 1937). By taking advantage of specialized labor, such as Louis Parker, the petitioner, the owner of the barge, J-9, cannot discard or delegate its responsibility to provide a sea-

worthy vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

For the foregoing reasons petitioner prays that the Court grant a rehearing in this matter and reverse the decision of the lower court and order the case remanded to the lower court so that judgment can be entered in favor of petitioner, Louis Parker.

Respectfully submitted,

KIERR AND GAINSBURGH

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522-2304

CERTIFICATE OF COUNSEL

I, Eldon E. Fallon, attorney for appellant, certify that this petition is presented in good faith, that it is not interposed for delay and that in my judgment it is well-founded.

October 16, 1969, New Orleans, Louisiana.

ELDON E. FALLON

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Rehearing has been forwarded to all counsel of record by depositing same in the U.S. Mail, postage pre-paid, this ____ day of October, 1969.

ELDON E. FALLON

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 7119
Admiralty Section G

LOUIS PARKER

versus

CARGILL, INC. and THE AETNA CASUALTY AND SURETY COMPANY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit for damages for personal injuries sustained by plaintiff, Louis Parker, as a result of the alleged unseaworthiness of the defendant Cargill, Inc.'s barge J-9. Plaintiff, at the time of his accident on February 17, 1964, was employed by Dravo Corporation, a ship repair facility, hired by the operator of the barge to perform certain work aboard the J-9.

The plaintiff in his suit alleged that his injuries proximately resulted from the negligence, carelessness and inattention of the agents, servants and employees of Dravo Corporation, which caused the barge J-9 to become unseaworthy, in the following respects:

"1. Failure of plaintiff's co-employees to pay sufficient attention to and maintain proper regard for plaintiff's safety aboard the barge, J-9, in the performance of his duties.

2. Failure to follow prescribed safety regulations and procedures pertaining to ladders and walkways aboard vessels.

3. The absence of reasonably suitable appliances, lights and appurtenances for the safe conduct of plaintiff's work aboard the J-9.

4. Presence of a portable light and extension cord on the steps of the ladder in the No. 3 hatch of the J-9."

The plaintiff filed a second cause of action against Aetna Casualty and Surety Company as the compensation insuror of Dravo Corporation, seeking Louisiana Workmen's Compensation Act benefits in the event that plaintiff was not entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act as against Dravo Corporation.

Defendant, Cargill, Inc., filed a third party action against Dravo Corporation, seeking indemnity from Dravo on the basis that if Cargill, Inc. was held liable to the plaintiff, suit liability arose from Dravo Corporation breaching its contract to perform its work in a workmanlike manner. Attorney's fees and costs were also sought.

Both Cargill, Inc. and Dravo Corporation answered the plaintiff's complaint denying that plaintiff was entitled to the warranty of unseaworthiness and denying that the vessel was in fact unseaworthy.

Aetna Casualty and Surety Company intervened in said proceedings for subrogation, seeking reimbursement fot the compensation and medical expenses paid to and in behalf of the plaintiff.

The parties to this litigation have submitted the following stipulations to the Court:

> "The Barge J-9 was involved in both molasses and coal trade. The cargo pump on the Barge J-9 began to malfunction. Trash, scale residue and other foreign matter was getting into the

pump and causing it to malfunction and had caused damage to the pump. This malfunction of the pump did not render the barge wholly inoperative, but the pump had to be repaired in order for the barge to carry molasses.'

'Cargill, Inc. decided to have the pump repaired and in order to prevent the malfunction from recurring, contracted to have the tanks or compartments on the barge cleaned.'

'Dravo Corporation undertook this work and the Barge J-9 was dry-docked for this purpose.'

'The cleaning operation required to cut holes in the bottom of the barge for drainage and generally when plates are put over the holes at the completion of the cleaning operation an air test is performed to make sure that there are no leaks in the area of these plates, and ordinarily when the compartments are cleaned, the barge is tested for other leaks and fractures and this was done on the J-9 on this occasion.'

'This type of work is periodically performed and is customarily done on an average of once every two years when the barge is carrying the same type of cargo as was the case with the J-9."

"That the empty unmanned barge J-9 was turned over to Dravo Corporation for cleaning

and repairs. Thereafter said vessel was dry-docked in a floating dry dock situated on navigable waters of the Mississippi River and repairs and cleaning of the barge were performed by Dravo Corporation as set forth in the invoice marked as Dravo #1. During the period that the repairs were being performed Dravo had the exclusive care, custody and control of the barge and the repairs to the barge were done solely under the supervision and control of Dravo.'

'The barge J-9 was dry-docked at 10:00 o'clock A.M. February 14, 1964, undocked at 9:00 o'clock A.M. February 20, 1964, and all work was completed on February 28, 1964, and thereafter the Barge J-9 returned to the same type work that it was doing prior to dry docking.'

The main work done to the barge, as reflected by the invoice, was dry-docking the barge, cutting two approximately 24" diameter holes in each of eight cargo compartments, cleaning the cargo holds, installing patch plates over the cut holes, gouging and welding fractures in side shell and bottom plating, repairing cargo pump, testing by means of air all compartments for leaks and cropping and renewing starboard stern corner of the barge. The total amount of the invoice was $5,452.00.

The plaintiff testified that he was injured when descending a ladder into one of the cargo tanks on February 17, 1964, to retrieve out of the hold a portable

light and extension cord and other equipment left there by another Dravo crew. The hold was dark. He said that he slipped on the ladder when he stepped on the hook of the portable light which was left hanging on one of the rungs of the ladder. He said that there was no defect in the ladder, although the evidence reflects that there may have been molasses on the ladder, although the evidence reflects that there may have been molasses on the ladder as well as on the outside top deck of the barge. The plaintiff also testified that he had molasses on his boots.

The evidence discloses that the portable light and cord were owned by Dravo and that the plaintiff could have turned on lights in the hold by simply turning on a switch about twenty feet away.

Conceding the ladder had molasses on it, or the upper deck had molasses on it, or the plaintiff was injured as claimed, this Court cannot find for the plaintiff.

When a repairman, such as the plaintiff, is aboard a vessel remedying an unseaworthy condition then existing, no warranty of seaworthiness runs in his favor with respect to the unseaworthy condition which he is called on to repair; and if he is injured as a result of the very unseaworthy condition he is attempting to remedy, he may not recover from the barge owner on the grounds of unseaworthiness. *Pinion v. Mississippi Shipping Company,* 156 F.Supp. 652 (E.D. La. 1957); *Bruszewski v. Isthmian S.S. Co.,* 163 F.(2) 720 (C.A.3rd — 1947); *Patterson v. Esso Jamestown,* 274 F.Supp. 854 (E.D. La. 1967).

Nor can the plaintiff under the facts of this case be permitted to recover here in view of the most recent decision emanating from the Fifth Circuit Court of Appeals in *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, (Nov. 1968). The majority opinion of the Court said:

> "In this case there were no major repairs or structural changes made in the barge although the collision damage required the renewal of side plating in two places, the renewal of some deck plating and the reworking of Nos. 4 and 5 roller hatch covers. This work required the barge to be dry-docked by Saucer who, from the time it received the barge until the work was completed, had exclusive control of the barge and the lighting under which the repairs were effected. The barge was designed to carry no motive power, lights or crew. Sioux City had no motive power, lights or crew. Sioux City had no representative or crew aboard at any time while the barge was in Saucer's yard. Under these circumstances we hold that there was no warranty of seaworthiness by the ship owner running in favor of shore-based workers on the vessel." 402 F.2d 238

And in the concurring opinion of Judge John R. Brown it is said:

> "If the circumstances bringing about the injury is a transitory condition resulting from the course of performing the contract by one

who alone has the present custody and control of the vessel, then the warranty of seaworthiness * * * does not extend to such person for such condition."

FINDINGS OF FACT

1.

Plaintiff, Louis Parker, at the time of his injury was an employee of Dravo Corporation, an independent contractor. He was a shipyard worker working in Dravo Corporation's repair facility in Baton Rouge, Louisiana, on February 17, 1964.

2.

At the time of plaintiff's accident on February 17, 1964, the Barge J-9 was owned by Cargill, Inc.

3.

The Barge J-9, an empty unmanned barge, was turned over to Dravo Corporation for cleaning and repairs.

4.

The said barge was dry-docked in a floating dry dock on navigable waters in the Mississippi River on February 14, 1964, undocked on February 20, 1964, and all work was completed by Dravo Corporation by February 28, 1964.

5.

The repairs and cleaning of the barge were performed by Dravo Corporation and at all times during the period of repairs and cleaning Dravo Corporation had the exclusive care, custody and control of the barge and said repairs and cleaning were done solely under the supervision and control of Dravo Corporation.

6.

Plaintiff, Louis Parker, was injured while descending a ladder into one of the cargo holds when he slipped, either because of a portable light hook hanging on one of the rungs of the ladder which portable light hook had been placed there by a previous Dravo crew cleaning the cargo hold, or because of molasses on the ladder, or both conditions acting concurrently.

7.

The cleaning of the Barge J-9 was to remove residual molasses and loose scale and corrosion from the said barge.

8.

The portable light was owned by Dravo Corporation and there was nothing defective about the ladder that plaintiff was descending at the time of his injury.

9.

The procedure used in cleaning the residual molasses and in repairing the vessel was entirely within the discretion of and under the control of Dravo Corporation.

10.

Plaintiff was injured while in the course of correcting and cleaning the molasses, which condition he was called aboard to correct, or he was injured as a result of the hanging portable light, which was a transitory condition resulting from the course of performing the contract of repairs by Dravo Corporation which alone had the custody and control of said barge, and, therefore, the warranty of seaworthiness did not extend from the barge or its owner, Cargill, Inc., to Louis Parker.

11.

The proximate cause of the plaintiff's injury was his own negligence and the negligence of his co-workers.

CONCLUSIONS OF LAW

1.

The Court has jurisdiction over this matter and venue is properly laid in the Eastern District of Louisiana.

2.

The Court finds as a matter of law that Cargill, Inc. nor anyone by whose action defendant is liable was guilty of any negligence which in any way caused or contributed to the cause of the accident and resulting injuries herein involved.

3.

The Court finds as a matter of law that the sole proximate cause of plaintiff's injuries was the concurrent negligence of plaintiff himself and his co-workers or employees of Dravo Corporation.

4.

The Court finds that the conditions giving rise to the plaintiff's injury was either or both, concurrently, of the following: First an unseaworthy condition of molasses present on the ladder and on the deck of the barge, which condition plaintiff, his co-employees and Dravo Corporation were called upon to repair and remedy, and that if he was injured from said unseaworthy condition, he is not entitled to recover for his injuries from the shipowner on the grounds of unseaworthiness, and, second, the cause of the plaintiff's fall was the presence of the portable light on the rung of the ladder, which was a transitory condition resulting from the course of performing the contract by Dravo which alone had custody and control of the vessel and therefore the warranty of seaworthiness did not extend to the plaintiff. *Patterson v. Esso James-*

town, 274 F.Supp. 854 (E.D. La. 1967); *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5th Cir. 1968). Counsel for plaintiff relies heavily, if not exclusively, upon *Allen v. Union Barge Line Corporation*, 239 F.Supp. 1004 (E.D.La. 1965), aff'd 361 F.2d 217, cert. den. 385 U.S. 1006. In *Moye*, supra, the 5th Circuit Court of Appeals set out the rule to be applied in these cases even citing with approval the reasoning in the *Allen* case.[1] In the instant case, considering the character of the work to be done by the shipyard, the absence of a crew, and the complete control by the shipyard over the vessel, we are convinced that the plaintiff is not entitled to the warranty of seaworthiness. The plaintiff's case lacks some of the determinative facts found in the *Allen* case.

5.

Since the Court concludes that the plaintiff's injuries were caused by the negligence of Dravo's employees, which constituted a breach of Dravo to perform its work in a workmanlike manner, Cargill, Inc. is entitled to recover from Dravo, pursuant to its third party demand, reasonable attorney's fees and costs incurred in defense of this suit. *Patterson v. Esso Jamestown*,

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[1]In *Lawlor* the Second Circuit took the position that it is no longer sufficient merely to require proof that the vessel is in navigation and that the shipyard worker is engaged in seaman's work, since *West* had made it clear that at least in some cases control of the vessel is the decisive factor. The Court concluded that "the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, and the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decison of this case." 275 F.2d at 604. We adopted this reasoning in *Union Barge Line Corporation v. Allen*, 5 Cir. 1966, 361 F.2d 217.

supra; *Strachan Shipping Company v. Koninklyke Nederlandsche S.M.N.V.*, 324 F.2d 746.

6.

In the event Cargill, Inc. and Dravo Corporation are unable to agree on what is reasonable for attorney's fees and costs, the Court will, upon application of either party, hear evidence pertaining thereto.

7.

The Court concludes as a matter of law that since plaintiff's injuries occurred upon a dry dock over navigable waters, his exclusive recovery as against Aetna Casualty and Surety Company as the insuror of Dravo Corporation is under the Longshoremen and Harbor Workers' Compensation Act. 33 U.S.C.A. 903.

8.

Since the Court finds that the plaintiff is not entitled to recover in this suit, the intervention filed by Aetna Casualty and Surety Company for recovery of compensation benefits previously paid to the plaintiff must as a matter of law be dismissed.

Judgement will be entered accordingly.

New Orleans, Louisiana
January 28th, 1969.

(Signed) JAMES A. COMISKEY
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition for a Writ of Certiorari has been forwarded to all counsel of record by depositing same in the U. S. Mail, postage pre-paid, this ____ day of January, 1970.

ELDON E. FALLON